

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LAM v MINISTER FOR IMMIGRATION

[2004] FMCA 121

MIGRATION – Application for review of a decision of the Migration Review Tribunal affirming a decision not to grant a protection visa – whether there was a failure on the part of the Tribunal to properly consider the mandatory considerations under Regulation 1.15A(3) of the *Migration Regulations 1994* – whether the Tribunal failed to avert to any matters regarding the household and nature of the parties relationship during times when the parties were together – whether the Tribunal failed to properly apply Regulation 1.15A(5) – whether the Tribunal failed to independently assess the matters under Regulation 1.15A – whether the Tribunal failed to give sufficient weight to photographic evidence – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), s.474

Migration Regulations 1994, Regs 1.15, 1.15A, 1.15A(d), 1.15A(3), 1.15A(5)

Federal Court Rules

Federal Magistrates Court Rules

re Minister for Immigration & Multicultural Affairs; ex parte Holland (2001)
185 ALR 504

Nassouh v Minister for Immigration and Multicultural Affairs (2000) FCA 788

NAAV v Minister for Immigration & Multicultural Affairs (2002) FCFCFA 228

Applicant:

THI KIM HONG HANH LAM

Respondent:

MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No:

MZ683 of 2003

Delivered on:

17 June 2004

Delivered at:

Melbourne

Hearing date:

18 February 2004

Judgment of:

Bryant CFM

REPRESENTATION

Counsel for the Applicant:	Mr Belbruno
Solicitors for the Applicant:	Joseph Belbruno
Counsel for the Respondent:	Ms Macdonnell
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

- (1) In accordance with my reasons, I order that the Application be dismissed.
- (2) The Applicant pay the Respondent's costs in default of agreement to be taxed pursuant to Order 62 of the Federal Court Rules having regard to Schedule 1 of the Federal Magistrates Court Rules.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MZ683 of 2003

THI KIM HONG HANH LAM
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant was born in Vietnam and has been an Australian citizen since 10 June 1998. She came to Australia with her mother under the sponsorship of her father and arrived in Australia on 20 April 1995.
2. On 15 July 2000 Hung Lam Le ("the visa applicant") applied for a class UF partner provisional visa ("the visa") on the basis that he was the spouse of the applicant.
3. On 13 December 2001 a delegate of the respondent refused the grant of the visa. On 30 January 2002 the applicant lodged an application with the Migration Review Tribunal ("the Tribunal") for a review of the decision to refuse the visa and that decision was affirmed by the Tribunal on 28 February 2003. On 24 March 2003 the applicant applied to the Federal Court of Australia for a review of the decision of the Tribunal made on 29 November 2002. The matter was transferred

to the Federal Magistrates Court by order of Marshall J on 26 June 2003.

Relevant legislation

4. The Tribunal found that the applicant had applied for review and that the visa applicant had advanced claims only in respect of subclass 309 (partner) visa. At the time of the applicant the Tribunal found that the visa applicant was validly sponsored by the review applicant who became an Australian citizen on 10 June 1998.
5. The marriage of the visa applicant and the review applicant took place in Vietnam and was registered on 13 September 1996. At the time of the applicant the visa applicant and review applicant were married to each other under a marriage that is recognised as valid for the purposes of the Act. At the time of the decision they were still married to each other. The Tribunal identified therefore that it needed to consider whether the visa applicant was the spouse of the review applicant at the time of application and continued to be the spouse of the review applicant at the time of decision.
6. Regulation 1.15A of the *Migration Regulations 1994* (“the Regulations”) contains the test to be applied to determine whether one person is the spouse of another person whether in a married or de facto relationship. Subregulation 1.15A(3) sets out the mandatory considerations to which the Tribunal must have regard in forming an opinion whether a married relationship or a de facto relationship exists. These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons' commitment to each other.

The Tribunal's decision

Background

7. The review applicant claimed to have met the visa applicant in 1994 while she and her family were still in Vietnam. She migrated to Australia with her family in 1995. She claimed that after obtaining permission from both families she returned to Vietnam to arrange the

wedding and the couple were married on 13 September 1996 in Vietnam. She lodged an application for the grant of a visa on 20 December 1996 but this was refused on 27 April 1999. The review applicant did not become an Australian citizen until 10 June 1998. The present application for a partner (provisional) class UF (visa) was made on 22 May 2000.

8. From the date of their marriage to date the visa applicant has continued to live in Vietnam and her review applicant continued to live in Australia.
9. The Tribunal found it was entitled to have regard to evidence subsequent to the date of the decision of the Tribunal. Having regard to the evidence presented and the application of Regulation 1.15A the Tribunal found that at the time of the application for the visa the applicant did not have a mutual commitment to a shared life together as husband and wife to the exclusion of all others and that the relationship between them was not genuine and continuing. The Tribunal therefore found that the visa applicant did not meet the criteria for a "married relationship" accordingly the visa applicant was not a "spouse" and did not satisfy clause 309.211(2) of the regulations at the time of application or clause 309.221 at the time of decision.
10. Upon a consideration of the matters in Regulation 1.15A(3) that it was bound to take into consideration the Tribunal made the following findings:-
 - a) in respect of the financial aspect of the relationship, there was an absence of evidence of any pooling or sharing of financial resources apart from a receipt dated 24 January 2003 for \$100 which, in light of the overall evidence was brought into existence to bolster the applicant's claim;
 - b) in respect of the nature of the household there was a lack of evidence of contact between the applicants from 1994 when they claim to have met and the applicant's visit to Vietnam in July 1996 or of contact between the applicant's return to Australia 13 days after their wedding in September 1996 and her next visit in March 2000 shortly before the visa application was made;

- c) in respect of the social aspect of the relationship
 - i) little weight was to be given to photographs of the applicant and the visa applicant during the applicant's visit in 2000, 2001 and in September 2002 which were taken by a photographer hired to provide photographic evidence in support of their claims;
 - ii) there was some evidence of the applicants residing at the same address but not sufficient to satisfy the Tribunal of a genuine and continuing relationship;
 - iii) there was a substantial number of letters and cards passing between the applicants from October 1996 through to 2002;
 - iv) there was evidence of telephone calls to the review applicant's stated number from late 2000 but the frequency was not significant;
 - v) there was little evidence to demonstrate that others were aware of the marriage and Centrelink had not been advised
- d) in respect of the nature of their commitment to each other:
 - i) there was a lack of evidence of the parties knowing each other prior to the applicant's visit in 1996 during which they married;
 - ii) the evidence also pointed to a joint intention to deceive the department or intention of the applicant to deceive the visa applicant in regard to the paternity of the review applicant's child;
 - iii) the applicant made no visits to Vietnam from September 1996 until March 2000 despite finding the financial resources to make three trips from March 2000 to October 2002; and
 - iv) the Tribunal found the applicant vague, if not evasive, in her evidence and, having regard to her demeanour at the hearing, found she lacked credibility.

The applicant's claims

11. The applicant effectively identified eight grounds arising from the contentions of law and fact and the application.

The failure to consider the matters in Regulation 1.15A

12. The applicant contended that Regulation 1.15A(3) sets out mandatory considerations which the Tribunal is required to consider in forming an opinion whether a married relationship or de facto relationship exists. The applicant contended that the decision of the Tribunal was a perfunctory one and that although the Tribunal had referred to the decision of the Federal Court in *Nassouh v Minister for Immigration and Multicultural Affairs* (2000) FCA 788, the Tribunal had not properly considered the matters in Regulation 1.15A(3) in forming an opinion about the existence of the married relationship. In particular, it was contended that the examination of the financial aspects of the relationship and the absence of any pooling or sharing of financial resources was given too much weight given the context of the parties circumstances and practical reality of living in two countries.

Failure to consider the nature of the household

13. The applicant contended that the Tribunal failed to avert to any matters regarding the household and did not consider the nature of the relationship during the times when the parties were together. A particular passage in which the Tribunal dealt with this issue was at paragraph 26 of its decision:

In respect to the nature of the household there is a lack of evidence that contact between the applicants from when they claim to have met in 1994 and the review applicant's visit to Vietnam in July 1996. The review applicant departed Vietnam about 13 days after the wedding in September 1996. The next visit to Vietnam by the review applicant is not until March 2000, after the first visa application was refused and shortly before the further application was made.

14. However there was nothing to indicate that the Tribunal ignored relevant evidence. There appears to have been little if no evidence of what the parties did during the periods they were together. The Tribunal considered the nature of the household but in the absence of

the applicant being able to point to any evidence ignored by the Tribunal no error can be demonstrated on the part of the Tribunal. In any event, the question and further, the question of what weight to be given to this factor is entirely a matter for the Tribunal.

The Tribunal wrongly applied Regulation 1.15A(5)

15. This Regulation provides:

If two persons have been living together at the same address for six months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

The applicant contended that the Tribunal incorrectly assessed subparagraph (5) as being essential to the establishment of a 'spouse' relationship.

16. The Tribunal's finding at court book 58, paragraph 27 on this issue was as follows:

There is some evidence of the review applicant residing at the same address as the visa applicant but the Tribunal is not satisfied that it is sufficient to conclude that it would constitute evidence pursuant to subregulation 1.15A(5).

17. The contention of the applicant must fail for two reasons. First, there is nothing to indicate that the Tribunal treated regulation 1.15A(5) as essential to the forming of a relevant opinion. Secondly, the Tribunal simply made a finding that the evidence did not enable it to find as a matter of fact the visa applicant and the applicant had lived together at the same address for six months, thus the Tribunal was not required to consider subsection (5). There is nothing to suggest that the Tribunal did not consider the relevant matters notwithstanding the finding that (5) did not apply.

18. **No reference to the social relationship.**

19. The applicant contended that the Tribunal failed to consider the social aspects of the relationship, however, the Tribunal clearly did so. The Tribunal at paragraph 27, noted in particular the fact that since the visit in 1996 when the marriage occurred the review applicant had lived in

Australia apart from about two months in 2000, two months in 2001 and about five weeks in September/October 2002. The Tribunal further noted that there was evidence of engaging a photographer to be with them during their travels on their visits in order to provide photographic evidence in support of their claim. The Tribunal considered the photographic evidence submitted as supporting social aspects of the relationship but determined that they should be given little weight given that they were taken apparently solely for the purpose of providing evidence to the Tribunal. This was clearly a question of weight however, to be given to the evidence and it is equally clear that the Tribunal did consider the social aspects of the relationship.

20. No reference to the commitment to each other

21. The applicant contended that the Tribunal did not consider matters in Regulations 1.15A(d) namely the nature of their commitment to each other. Again however, the Tribunal did consider this aspect¹. The Tribunal noted that there was a lack of evidence of the parties knowing one another prior to the applicant's visit in 1996 during which they married. The Tribunal also noted that the evidence on the evidence regarding the paternity of the review applicant's child was concerning and pointed either to a joint intention to deceive the department or to the review applicant attempting to deceive the visa applicant. This comment related to the consideration of the evidence before the delegate which the Tribunal considered². The Tribunal noted that the delegate had stated that the applicant had claimed that at the time he married he considered himself to be the father of the review applicant's child but had no photographs of him with the review applicant and the child. The delegate had noted that the review applicant was evasive at interview when asked about the father of the review applicant's child.
22. At the Tribunal hearing the review applicant said the child was not the visa applicant's child but that she had first thought the child was the visa applicant's child. The review applicant said her child was born on about 16 December 1995 and the Tribunal pointed out to her that there was no evidence of any contact between the parties on their evidence if

¹ See Court Book, paragraph 24, page 58.

² See Court Book, page 54.

it was accepted that they had met in 1994, and at the time of the marriage in 1996. However it is noted that the information given to the delegate about when their relationship started was contradictory³. The Tribunal was entitled to treat this evidence with some scepticism and it was obviously a matter which went to their commitment. The Tribunal were also entitled to give the weight they did to the photographs which were the only evidence of a physical relationship at all.

That the Tribunal did not independently assess the matters under Regulation 1.15A

23. The applicant contended that the Tribunal did not independently assess the matters for itself but relied upon the delegate's decision. In my view there is no substance to this ground. The obligation of the Tribunal was to form an opinion whether at the time of application and decision, the applicant and her spouse lived together as husband and wife to the exclusion of all others and that the relationship between them was genuine and continuing. This the Tribunal did. In doing so it considered the matters it was bound to consider in Regulation 1.15A. In considering what weight to give to various matters the Tribunal was required to consider the evidence and make findings which it did. In doing so it was entitled to have regard to all of the evidence including that which was before the delegate. There is no substance in my view in a contention that the Tribunal abrogated its responsibility in some way and relied on the delegate's decision albeit the Tribunal came to the conclusion, having performed its task that the delegate's decision should be affirmed.

Insufficient weight was given to the photograph

24. The applicant conceded that a decision to give little weight to the particular matter is not a jurisdictional error. The applicant however contended that the Tribunal had in fact asked itself the wrong question when considering the social aspects of the relationship and in particular in its finding that or in its conclusion that the photographs taken by a professional photograph do not have the same weight as photographs taken by the parties. Weight is a matter for the Tribunal.

³ Ibid.

25. The Tribunal gave no reasons or explanation for finding the demeanour that the review applicant amounted to a lack of credibility.

This contention relates to the Tribunal's finding at paragraph 28 that “The Tribunal found the review applicant vague, if not evasive in her evidence and also, having regard to her demeanour in the hearing, found she lacked credibility”

26. As to evidence given by the applicant at the hearing, the Tribunal was entitled to have regard to the demeanour of the applicant. (see *NAAV v Minister for Immigration & Multicultural Affairs* (2002) FCFC 228 and in which Black CJ, Beaumont, Wilcox, French and von Doussa JJ said at [78]):

Evaluation of the credibility of an account given by an applicant is subjective and depends upon many factors, including observations of an applicant at the hearing.

27. It was open to the Tribunal to find that the applicant lacked credibility having regard to its finding that she was vague, if not evasive in her evidence and also having regard to her demeanour.
28. The Tribunal's finding regarding the lack of evidence for the parties prior to 1996 was also a relevant matter, relevant to the nature of their commitment to each other. In *Tolibao-Cortes v Minister for Immigration & Multicultural Affairs* [2001] FCA 1183 at [8] Heerey J said:

The terms of regulation 1.15A(3) requires the decision maker to deal with specific aspects, the decision maker is not relieved from the obligation to make findings of fact if, in the circumstances of the case, they are relevant.

29. The Tribunal's decision was reasonably short but the facts and the evidence led was necessarily circumscribed by the facts. Those facts were that the parties had married in 1996, they had never lived in Australia together and the applicant had spent only three brief periods in Vietnam with something approaching a four year break. It was open to the Tribunal to take into account as part of the background that the first visit following the wedding was March 2000 and immediately preceded the visa application made on 22 May 2000. The Tribunal considered the letters between the review applicant and the visa

applicant and telephone bills but it was noted that the evidence of telephone bills commenced in November 2000, several months after the application.

30. The Tribunal is required by Regulation 1.15A(3) to have regard to all the circumstances of the relationship between the applicant and the visa applicant and was entitled to take into account any inconsistencies in their accounts of their wedding and of the time spent together during the applicant's visits to Vietnam. The Tribunal in relation to their commitment to each other noted that there was considerable doubt about whether they knew each other prior to the marriage. The absence of visits between the date of the marriage and the application and that having regard to the demeanour of the review applicant of the application lacked credibility.
31. The applicant must establish that the Tribunal's decision is attended by jurisdictional error. Section 474 of the *Migration Act 1958* (Cth) ("the Act") operates to prevent judicial review of a decision unless the applicant can show that the Tribunal violated a provision of the Act which prevails over s.474. The Tribunal correctly carried out its task in forming an opinion of whether the applicant was a "spouse" for the purposes of the regulations and in doing so had regard to the relevant considerations and Regulation 1.15A. The Tribunal's findings of fact meant that the visa application could not be granted as the parties were not spouses at the time of the application and, ergo could not have been "spouses" at the time of decision. Even if the Tribunal erred in finding that the applicant did not satisfy the definition of "spouse" for the purpose of Regulation 1.15 such an error would have been an error of fact and evaluation of evidence and within jurisdiction (see *re Minister for Immigration & Multicultural Affairs; ex parte Holland* (2001) 185 ALR 504 at [23] – [35]).
32. Thus, the application must be dismissed.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Bryant CFM

Associate: Peter Smith

Date: 17 June 2004